(1)
S[illegible]ourt, U.S.
L E D
95 1063 JAN 2 - 1996
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

WILLIAM B. BLOUNT,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

KEVIN T. BAINE*
ROBERT B. BARNETT
ERIK S. JAFFE
KEVIN M. DOWNEY
WILLIAMS & CONNOLLY
725 12th St., N.W.
Washington, D.C. 20005
(202) 434-5000

ANDREW P. CAMPBELL
LEITMAN, SIEGAL, PAYNE & CAMPBELL, P.C.
600 North 20th St., Suite 400
Birmingham, Alabama 35203
(205) 251-5900

Attorneys for Petitioner

**Counsel of Record*

151 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Amendment permits the Securities and Exchange Commission effectively to prohibit municipal bond professionals from making or soliciting any political contributions, however small, to certain candidates for state and local office.

2. Whether the Tenth Amendment permits an agency of the *federal* government to regulate *state* political activity and effectively to prohibit certain financial dealings by the States, absent an unmistakably clear statement of intent by Congress that it may do so.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the District of Columbia Circuit are those set forth in the caption and the Municipal Securities Rulemaking Board, as intervenor. The parties have no parent companies or subsidiaries.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING BELOW ii

TABLE OF AUTHORITIES iv

OPINIONS AND ORDERS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 9

I. The Case Involves Questions of National Importance 9

II. The Decision Conflicts with the Rationale of *Buckley v. Valeo* 11

III. The Decision Conflicts with the Rationale of Controlling Tenth Amendment Precedents 18

CONCLUSION 21

APPENDICES A-1

TABLE OF AUTHORITIES

CASES:

Atascadero State Hospital v. Scanlon,
473 U.S. 234 (1985) 18
Bolger v. Youngs Drug Products Corp.,
463 U.S. 60 (1983) 13
Buckley v. Valeo,
424 U.S. 1 (1976) 11, 12, 13, 15, 16
California State Board of Optometry v. FTC,
910 F.2d 976 (D.C. Cir. 1990) 18, 19
Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) 16
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 18, 19, 20
Gregory v. Ashcroft,
501 U.S. 452 (1991) 18, 20
Mills v. Alabama,
384 U.S. 214 (1966) 18
Rosenberger v. Rector and Visitors of the University of Virginia,
115 S. Ct. 2510 (1995) 13
SEC v. Lowe,
556 F. Supp. 1359 (E.D.N.Y. 1983),
aff'd, 779 F.2d 36 (2d Cir. 1985) 16
South Carolina v. Baker,
485 U.S. 505 (1988) 8, 21
Tashjian v. Republican Party of Connecticut,
479 U.S. 208 (1986) 20

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS:

U.S. Const. amend. I 2, 5, 9, 16, 18
U.S. Const. amend. X 2, 8, 9, 18, 20, 21

2 U.S.C. § 437h 11
15 U.S.C. § 78*dd*-1(a) 3
15 U.S.C. § 78*o*-4(b) 3
15 U.S.C. § 78*s* 3, 7
15 U.S.C. § 78*y* 7
28 U.S.C. § 1254(1) 2

11 C.F.R. Part 110 10

Rule G-37 . . . . . *passim*

Alaska Stat. § 15.13.070(a) 10
Cal. Gov. Code § 85301(a) 10
Flor. Stat. Ann. § 106.08 10

MISCELLANEOUS:

The Supreme Court, 1990 Term—Leading Cases, 105 Harv. L. Rev. 177 (1991) 19

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

WILLIAM B. BLOUNT,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

William B. Blount respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS AND ORDERS BELOW

The August 4, 1995 opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 61 F.3d 938 and is reproduced at Appendix ("App.") A. The court of appeals' October 4, 1995 orders denying petitioner's request for rehearing and suggestion for rehearing *in banc* are reproduced at App. F.

The April 7, 1994 Securities and Exchange Commission ("SEC") order approving the Rule under review is reproduced at App. B. The April 7, 1994 SEC order preliminarily considering whether to issue a stay *sua sponte* and establishing guidelines for seeking stay applications is

reproduced at App. C. The May 4, 1994 SEC order denying the application of William B. Blount for a stay is reproduced at App. D. The May 6, 1994 order of the United States Court of Appeals for the District of Columbia Circuit, granting in part and denying in part William B. Blount's request for a stay is reproduced at App. E.

JURISDICTION

The court of appeals' opinion and judgment were entered on August 4, 1995. The orders denying petitioner's timely filed petition for rehearing and suggestion for rehearing *in banc* were entered on October 4, 1995. This petition is filed within 90 days of those orders. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The Tenth Amendment to the United States Constitution provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

15 U.S.C. § 78*o*-4(b), relating to the authority of the Municipal Securities Rulemaking Board ("MSRB") to propose rules, is reproduced, in relevant part, at App. G-1 to G-2.

15 U.S.C. § 78*s*, relating to the SEC's authority to approve rules proposed by the MSRB, is reproduced, in relevant part, at App. G-2.

Rule G-37, the SEC-approved Rule under consideration in this case, is reproduced, in relevant part, at App. G-3 to G-4.

STATEMENT OF THE CASE

In August 1993, the Municipal Securities Rulemaking Board ("MSRB"), a self-regulatory organization established by Congress to develop rules governing the municipal securities business, 15 U.S.C. § 78*o*-4(b), published a draft rule that would have prohibited municipal securities dealers from making contributions to state and local government officials "for the purpose of obtaining or retaining" municipal securities business. JA 789.[1] Draft Rule G-37 was modeled after the Foreign Corrupt Practices Act[2] and did not contain the provisions currently being challenged. After receiving

---

[1] "JA" refers to the Joint Appendix filed in the court of appeals and containing the record on review.

[2] The Foreign Corrupt Practices Act, 15 U.S.C. § 78*dd*-1(a), prohibits certain payments to "any foreign official *for purposes of* . . . [influencing or inducing specified acts or omissions] in order to assist [a securities issuer or domestic concern] in obtaining or retaining business for or with, or directing business to, any person . . ." (emphasis added).

comments on the Draft Rule, the MSRB in January 1994 submitted a revised Rule G-37 to the SEC for its approval. JA 644. The revised Rule, which went well beyond the original proposal, contained the provisions that are the subject of this case:

- Rule G-37(b), which provides: "No broker, dealer or municipal securities dealer shall engage in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by" the broker, dealer or associated "municipal finance professional," except for a contribution not exceeding $250 by a municipal finance professional to a candidate for whom he is entitled to vote.

- Rule G-37(c), which provides: "No broker, dealer or municipal securities dealer or any municipal finance professional . . . shall solicit any person or political action committee to make any contribution, or shall coordinate any contributions, to an official of an issuer with which the broker, dealer or municipal securities dealer is engaging or is seeking to engage in municipal securities business."[3]

Subsection (b) of the MSRB's revised proposal, which effectively prohibited certain campaign contributions

---

[3] These provisions are supplemented by Rule G-37(d), which provides that no regulated entity "shall, directly or indirectly, through or by any other person or means, do any act which would result in a violation of sections (b) or (c) of this rule."

altogether, was responsive to the concerns of some commentators, who felt that it would be difficult to determine whether a contribution was made for the purpose of obtaining or retaining business. Subsection (c), on the other hand, which banned all solicitation of contributions to certain candidates, was added by the MSRB almost as an afterthought and with no explanation whatsoever of the reason or need for it. *See* JA 657.[4] The MSRB did not consider any potential First Amendment problems with its proposed Rule, because it mistakenly thought that the Rule was private action that did not have to conform with the First Amendment. JA 671.[5]

After additional notice and opportunity for comment, the SEC approved Rule G-37 by order dated April 7, 1994. App. B. Unlike the MSRB, the SEC acknowledged that the Rule's contribution limitation infringed First Amendment "speech and associational rights." App. B-36. The SEC, however, found the infringement justified by several interests. First, the SEC explained, the Rule would advance the "interest in preventing fraudulent and manipulative acts and

---

[4] Only two of the numerous commentators suggested any restriction on the solicitation of contributions. One of those simply recommended a ban on soliciting contributions from other municipal securities employees covered by the Rule. JA 850. Only one commentator mentioned a ban on all solicitations to certain candidates. JA 841. That suggestion, which was contained in a single sentence and unaccompanied by any explanation, was made by the MSRB Chairman's firm, Goldman Sachs & Co.

[5] The MSRB has adhered to this position throughout this litigation. The court of appeals rejected it, noting that "Rule G-37 constitutes government action of the purest sort." App. A-7.

practices, as well as the appearance of fraud and manipulation, in the municipal securities market." App. B-28. In short, the Rule would offer a measure of "investor protection." App. B-29 to B-30. Second, the SEC concluded that the Rule would "perfect the mechanism of a free and open market for municipal securities" by eliminating "artificial barriers to competition for those firms that either cannot afford or decide not to make political contributions." App. B-32. Third, the Commission claimed that the Rule would "promote just and equitable principles of trade." App. B-33.[6]

The SEC did not address subsection (c)'s ban on the solicitation of contributions, except in a footnote noting that the provision was "intended to prevent circumvention" of the contribution limitations. App. B-38 n.68. There was no recognition by the SEC of the special problems presented by subsection (c)'s attempt to regulate the content of political speech.

At the same time that it approved Rule G-37, the SEC issued an order preliminarily considering whether to issue a stay *sua sponte*, rejecting such a stay, and establishing procedures for third parties to request a stay of the Rule pending judicial review. App. C. On April 25, 1994, petitioner William B. Blount timely sought a stay of the SEC's approval order pending judicial review.

---

[6] The Commission also noted that the Rule would foster cooperation and coordination in regulating municipal securities transactions and that its records and record retention provisions were consistent with statutory authority. App. B-33 to B-34. These records provisions are not being challenged here.

On April 26, 1994, petitioner timely filed a petition for review of the SEC's approval order in the United States Court of Appeals for the District of Columbia Circuit. The jurisdiction of the court of appeals was based upon 15 U.S.C. § 78*y* and 15 U.S.C. § 78*s*. The MSRB sought, and was allowed, to participate as an intervenor in support of the SEC.

Because the SEC had not yet ruled on petitioner's application for a stay, petitioner moved, on April 29, 1994, for a stay of the SEC's order pending judicial review. The SEC opposed the motion for a stay and, on May 4, 1994, denied petitioner's application to the SEC for a stay. App. D. On May 6, 1994, the court of appeals granted petitioner's motion in part and denied it in part, staying the Rule's solicitation ban as it applied to the petitioner. App. E.

The court of appeals denied the petition for review on August 4, 1995. At the outset, it rejected the MSRB's contention that the Rule was non-governmental action. App. A-5 to A-7. The court then proceeded to uphold the Rule on the merits. As the court of appeals summarized the record, the Commission's justifications for the Rule contained two asserted interests: "(1) protecting *investors* in municipal bonds from fraud and (2) protecting *underwriters* of municipal bonds from unfair, corrupt market practices." App. A-14 (emphasis added). The court rejected the SEC's position that the Rule could be justified by the first of these two interests—the need to protect investors. In the absence of any "data" to support the Commission's position, the court "share[d] the petitioner's skepticism" that so-called pay-to-play practices had caused any "harm to investors." App. A-16. Moreover, the court noted, "[i]f the Commission's goals were only to protect the investing public, disclosure [of

contributions] and record-keeping requirements might do the job." App. A-21.

The court concluded, however, that the Rule was necessary to achieve the SEC's second "compelling" interest—protecting underwriters from unfair and corrupt practices. The "link" between the Rule and that interest was, in the court's opinion, "self-evident." App. A-17. And the Rule was narrowly tailored to advance that interest, the court concluded, because "none of the alternatives presented would be even *almost* equally effective." App. A-22. The prohibition on the solicitation of contributions was necessary, the court noted, because otherwise "underwriters could easily circumvent the prohibition against direct contributions." App. A-22.

The court of appeals dismissed petitioner's Tenth Amendment challenge with three observations: first, that "Rule G-37 neither compels the states to regulate private parties . . . nor regulates the states directly"; second, that the Rule did not have the "preemptive effect on states' ability to control their own electoral process that might be perceived as 'destructive of state sovereignty'"; and third, that "*Congress* is [not] disabled from regulating private persons in their conduct of interstate trade in municipal securities." App. A-26 (emphasis added). The court did not address the fact that an *administrative agency*, not Congress, was responsible for Rule G-37, nor did it comment upon petitioner's argument that Rule G-37 *effectively* regulated the States, just as in the case of *South Carolina v. Baker*, 485 U.S. 505 (1988).

Petitioner timely sought a rehearing, and suggested a rehearing *in banc*, both of which the court of appeals denied on October 4, 1995. App. F.

REASONS FOR GRANTING THE WRIT

I. THE CASE INVOLVES QUESTIONS OF NATIONAL IMPORTANCE

Rule G-37 places unprecedented restrictions on the First Amendment rights of municipal securities professionals and the Tenth Amendment rights of the States:

- The Rule effectively prohibits municipal securities professionals from making any contribution of any amount to certain candidates. More significantly, the Rule regulates the content of political speech by prohibiting municipal securities professionals from soliciting contributions to certain candidates for public office. *It is, in fact, the only provision of federal law that prohibits a private citizen from soliciting a lawful political contribution.*

- Through this Rule, an agency of the *federal* government has prohibited certain forms of individual political activity at the *state* and *local* level, and has prohibited financial dealings between the *States* and certain private entities. It is the only federal regulatory provision that displaces the authority of the States over their own elections without express statutory or constitutional authority.

The restrictions imposed by Rule G-37 go far beyond the provisions of the Federal Election Campaign Act. That law requires the disclosure of contributions and imposes

limitations on the size of contributions. 2 U.S.C. §§ 434, 441a; 11 C.F.R. Part 110. Most States have adopted similar disclosure requirements and contribution caps. *See, e.g.*, Alaska Stat. § 15.13.070(a) ($1000 annual contribution cap); Cal. Gov. Code § 85301(a) (same); Florida Stat. Ann. § 106.08 ($500 contribution cap per election); *see also* App. B-39 n.69 (SEC noting state contribution ceilings even lower than the general federal contribution ceiling).

Not content with existing limits on state political activity, the SEC has taken it upon itself effectively to (1) prohibit contributions to certain candidates altogether and (2) dictate what private citizens may say in the course of a political campaign. Those subject to the Rule may deliver a speech saying that a candidate for certain offices "deserves your vote," but may not say that the candidate "needs your financial support."

Never before has an agency of the federal government sought to impose any such restriction on the content of political speech by private citizens advocating entirely lawful activity. Never before, in fact, has an agency of the *federal* government sought to impose *any* restriction on the participation of private citizens in *state* political activity. In both of these respects, this Rule—and the decision of the court of appeals upholding it—are unprecedented.

Review of the court of appeals' decision is warranted both because of its far-reaching practical impact and its ground-breaking legal importance. By upholding this Rule, the court of appeals has curtailed the ability of private citizens in every state and municipality in this country to participate in the political process. At the same time, it has displaced the authority of every state and municipality to regulate the

conduct of its own elections. These effects are drastic and they are ongoing. The time to consider whether they are warranted is now—on direct review of the Rule, before the Rule works irreparable mischief in state and local elections throughout the country.[7]

Because Rule G-37 systematically restricts the core political speech of countless numbers of private citizens, and because it interferes with state and local regulation of elections as well as state and local bond business, it raises questions of national importance that warrant this Court's review.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE RATIONALE OF *BUCKLEY v. VALEO*

The court of appeals' decision upholding Rule G-37 cannot be squared with the principles underlying this Court's decision in *Buckley v. Valeo,* 424 U.S. 1 (1976). In that case, the Court struck down campaign laws that "place[d] substantial and direct restrictions on the ability of . . . citizens

---

[7] When Congress enacted the Federal Election Campaign Act—an act that imposed restrictions far less severe than this Rule, *see* pp.12-13, *infra*—it recognized the importance of providing for prompt Supreme Court review. The Act contained provisions directing that constitutional questions be certified "immediately" to the court of appeals, authorizing a direct appeal to this Court, and directing that review be "expedite[d] to the greatest extent possible." 2 U.S.C. § 437h. The same considerations that prompted Congress to provide for immediate review of the Federal Election Campaign Act's restrictions on political activity warrant this Court's early review of Rule G-37's more extreme restrictions.

. . . to engage in protected political expression." *Id.* at 58-59. There could be no more "substantial and direct restriction" on the fundamental right of political expression than a restriction on the permissible content of a political message. And that is what Rule G-37(c) imposes—a restriction on what a private individual may say in the context of a political campaign.

In *Buckley*, this Court emphasized that "the constitutional guarantee [of freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office." 424 U.S. at 15 (citation omitted). The Court proceeded to uphold provisions of the Federal Election Campaign Act that required disclosure of campaign contributions and that established ceilings on contributions to candidates, but it struck down a provision that prohibited independent expenditures in support of a candidate. "[A] limitation upon the amount that any one person or group may contribute to a candidate," the Court explained, "entails only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20-21. The limitation on independent expenditures, on the other hand, "impose[s] significantly more severe restrictions on protected freedoms of political expression and association." *Id.* at 23. Unlike the contribution ceiling, the independent expenditure ceiling, the Court held, "place[s] substantial and direct restrictions on the ability of . . . citizens . . . to engage in protected political expression, restrictions that the First Amendment cannot tolerate." *Id.* at 58-59.

Rule G-37's effective prohibition against contributions in any amount to certain candidates, and its flat-out ban on the solicitation of contributions, place even more "substantial" and more "direct restrictions on the ability of . . . citizens . . . to engage in protected political expression" than the

independent expenditure ceiling struck down in *Buckley*. *Id.* The ban on the solicitation of contributions is particularly offensive, because it violates the fundamental principle that "the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector and Visitors of the University of Virginia,* 115 S. Ct. 2510, 2516 (1995). The solicitation ban dictates what an individual may say and what he may not say when he enters the political arena: he may ask for votes, but he may not ask for contributions. For the first time in this country, private citizens must watch their words when they engage in political speech. They may say that a certain candidate "needs your vote," but they may not say that he "needs your financial support."[8] A particular political message is off-limits. And the prohibited message is an important one, for it is difficult to wage a successful election campaign without a successful fundraising effort.

"[O]nly in the most extraordinary circumstances" has the Supreme Court sustained a content-based restriction on noncommercial speech. *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 65 (1983). And under *no* circumstances has the Supreme Court, or any court for that matter, sustained a restriction on the content of routine *political* speech by private citizens—speech to which the First Amendment has its "fullest and most urgent application." *Buckley,* 424 U.S. at 15 (citation omitted).

---

[8] The prohibition applies not only to solicitations for the benefit of an official who has given the dealer business, but also solicitations to defeat such an official or to reelect an official who has declined to give the dealer business. In short, the prohibition applies regardless of whether the solicitation might reasonably be regarded as part of some *quid-pro-quo* arrangement.

The court of appeals applied "strict scrutiny" to the Rule and concluded that it was "narrowly tailored" to advance a "compelling" government interest. App. A-13. It is difficult to accept that conclusion, however, when the court of appeals acknowledged that "the record contains only *allegations*" of abuses, not *evidence* or *findings*, and that the Rule was not necessary to advance its principal objective after all. *Id.* A-16 (emphasis added).

The court of appeals thought it sufficient to warrant a prophylactic rule that there was a "likelihood" of "pay to play" practices, which it understood as "bring[ing] the donor merely a chance to be seriously considered, not the assurance of a contract." *Id.*. The court of appeals agreed with the petitioner, however, that the Rule was not necessary to advance the first of the two "compelling" interests invoked by the Commission to justify the Rule—"protecting investors in municipal bonds from fraud." *Id.* A-14. "Even assuming the prevalence of quid pro quos" (a matter as to which it agreed there was no evidence), the court of appeals "share[d] the petitioner's skepticism" that there would be any "harm to investors" as a result. *Id.* A-16. Moreover, the court explained, "[i]f the Commission's goals were only to protect the investing public, disclosure and record-keeping requirements might do the job." *Id.* A-21.

The court of appeals upheld the Rule based solely on the Commission's secondary objective—"protecting *underwriters* of municipal bonds from unfair, corrupt practices." *Id.* A-14 (emphasis added). The court accepted the Commission's explanation that protecting firms that "either cannot afford or decide not to make political

contributions" advanced the goals of a free market and equitable principles of trade. App. A-17.[9]

Simply to identify these laudable objectives, however, does not justify the extreme restrictions that this Rule works on political freedom. Perhaps these goals can justify the Rule's $250 ceiling on contributions to candidates for whom an individual is entitled to vote—a "marginal" restriction on political freedom. *Buckley,* 424 U.S. at 20. But how can they justify an effective ban on contributions to other candidates? Is there a danger that a $250 contribution will corrupt the process of selecting municipal securities underwriters?

And how can the interest identified by the court of appeals justify a ban on solicitation that amounts to censorship of political speech? The court of appeals accepted the SEC's answer that without the ban on solicitation of contributions, "underwriters could easily circumvent the prohibition against direct contributions." App. A-21 to A-22. But the independent expenditure ceiling in *Buckley* also was justified as a measure to prevent circumvention of a contribution provision, and that justification was rejected for reasons that also apply here. First, the provision's "effectiveness as a loophole-closing provision" is "undermine[d]" by the fact that individuals can curry just as much favor with candidates by soliciting votes and engaging in other campaign activity as they can by soliciting contributions. *Buckley,* 424 U.S. at 45. And second, as in

---

[9] The court of appeals did not find, however, that the unfair selection of underwriters was a significant problem, but instead decided that the mere possibility of such unfair treatment was sufficient to justify the Rule as a prophylactic measure. App. A-16.

Buckley, the solicitation of contributions "does not presently appear to pose dangers of real or apparent corruption comparable to those identified with" the making of contributions. *Id.* at 46. In fact, *not a single commentator before the MSRB or the SEC—110 in all—even suggested that the solicitation of contributions had posed an actual problem.*

Rule G-37 is a textbook example of overkill—an extreme measure adopted in the single-minded pursuit of a laudable goal without any real consideration of the impact on First Amendment rights and without any real consideration of whether the Rule's most drastic provisions are truly necessary. There is, as the court of appeals acknowledged, App. A-16, no evidence that municipal securities business has ever been awarded because of a political contribution, only a perception that it has.[10] There is not even a *perception* that business has been awarded because of small contributions under $250. And there has never been a suggestion by anyone that business has been awarded because of the mere solicitation of contributions. In short, there is no evidence of

---

[10] The Commission made no finding on the extent of political contributions by underwriters or the extent to which business has been awarded based on contributions. An earlier staff report contained the frank admission that the staff was "unable" to draw conclusions on these issues. JA 85. Recognizing the deficient state of the record regarding *actual* abuses, the Commission took the position in the court of appeals that the Rule could be justified as an effort to combat "perceived abuses" that "diminish[] investor confidence." JA 1061, 1074. Of course, disclosure requirements would adequately address problems of perception. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299-300 (1981); *SEC v. Lowe*, 556 F. Supp. 1359, 1366 (E.D.N.Y. 1983), *aff'd*, 779 F.2d 36 (2d Cir. 1985).

any substantial danger, real or perceived, that would not have been addressed fully by a contribution ceiling and a disclosure requirement—the kinds of remedies upheld by this Court in *Buckley*.

If this Rule's prohibitions can be upheld on the record in this case—based on the possibility that even a $250 contribution or the mere solicitation of a contribution may influence government action—then similar bans could be imposed on anyone who stands to gain from any action of government. On the state and federal level, countless individuals and entities have an interest in virtually every action of the executive and legislative branches.[11] But citizens' interest in governmental decisions has never been thought sufficient to justify prohibiting them from making even a token contribution to a candidate or from urging others to support a candidate. To be sure, extreme measures like these will minimize the risk that government officials will be influenced in their official actions by their need for campaign

---

[11] The court of appeals itself noted that the "class of people" who would be covered by the Rule's rationale would be "very broad"—including "all who benefit in their business from government activity creating a market for their goods or services (from lawyers specializing in SEC work to suppliers of environmental control technology); all whose businesses benefit from the imposition of regulatory, tax, or tariff restrictions on competitors or potential competitors; all whose income enjoys any kind of tax advantage; and all who are employed by or otherwise economically dependent on firms fitting the description above," as well as "anyone who (directly or indirectly) is seeking to receive any such benefits and anyone seeking to stave off either the cancellation of existing benefits or the imposition of new burdens." App. A-11 to A-12.

funds. But that is a risk that is inherent in today's political system—and that is held in check by the very provision of the Bill of Rights that is infringed by this Rule. The First Amendment itself provides "a powerful antidote to any abuses of power by governmental officials." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). And at some point, the protection against political corruption must come not from further restrictions on political freedom, but from the guarantees that contributions are made in the open and that citizens have the freedom to subject those contributions and those who receive them to scrutiny.

III. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE RATIONALE OF CONTROLLING TENTH AMENDMENT PRECEDENTS

The court of appeals' treatment of the Tenth Amendment issue in this case conflicts with a series of decisions by this Court. The controlling case law imposes limitations on the power of administrative agencies to regulate in areas, such as state elections, that are fundamental to the States as sovereigns. *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985); *California State Board of Optometry v. FTC*, 910 F.2d 976, 981 (D.C. Cir. 1990). The court of appeals observed that "*Congress* is [not] disabled from regulating" the conduct at issue here. App. A-26 (emphasis added). But the point, unaddressed by the court of appeals, is that *Congress* has *not* acted, and that in the absence of an "unmistakably clear" statement by Congress, an *administrative* agency *is* disabled from regulating on matters fundamental to the States as sovereigns. *See Gregory*, 501 U.S. at 460 (citation omitted); *Atascadero State Hospital v. Scanlon*, 473

U.S. 234, 242 (1985); *California State Board,* 910 F.2d at 981.

The requirement of an "unmistakably clear" statement of Congressional intent is intended precisely to prevent what has happened in this case—an unwarranted intrusion by the federal government into matters of state sovereignty. The States' participation in the election of representatives to Congress "ensures that laws that unduly burden the States will not be promulgated" by the Congress. *Garcia*, 469 U.S. at 556. But the States do not enjoy the same "built-in" protections when it comes to regulatory action. *Id.* "Unlike Congress, administrative agencies do not in any sense represent the interests of the states." *The Supreme Court, 1990 Term—Leading Cases,* 105 Harv. L. Rev. 177, 204 (1991). To permit administrative agencies to act unilaterally on matters of vital interest to the States as sovereigns, without a clear authorization by Congress, "would short-circuit the protections offered States by the political process." *California State Board*, 910 F.2d at 981.

The SEC's broad rulemaking authority does not contain any "unmistakably clear" statement of intent that would authorize displacing the States' authority over their own election campaigns. Indeed, before this Rule was promulgated, the SEC made clear that it understood the limits of its authority in this area. When the Commission Chairman was questioned at a Congressional hearing before Rule G-37 assumed its present form, he assured the Congress that he was "exceedingly reluctant at any time to impose Federal involvement in State activities of any kind," and that "the ability of the Commission, or the Congress for that matter, to involve themselves in this area is extremely limited except again to push toward a solution." JA 298. The

Commission's subsequent reversal of course violated that assurance, exceeded the statutory authority conferred by Congress, and violated the Tenth Amendment.

The court of appeals minimized the impact of the Rule on the States, noting that it "does not have anything resembling the kind of preemptive effect on states' ability to control their own election processes that might be perceived as 'destructive of state sovereignty.'" App. A-26 (quoting *Garcia*, 469 U.S. at 554). But there is no doubt that this Rule displaces the power of the States to regulate their own election campaigns: the States cannot permit campaign contributions and solicitations that the Rule forbids. And there is no doubt that "'the Framers of the Constitution intended the states to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.'" *Gregory*, 501 U.S. at 461-62 (citation omitted); *see also Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986) ("the Constitution grants to the States a broad power [to regulate Congressional elections] . . . which power is matched by state control over the election process for state offices").

Rule G-37 "goes beyond an area traditionally regulated by the States" into an area that involves choices "of the most fundamental sort for a sovereign entity." *Gregory*, 501 U.S. at 460. For if sovereignty means anything, it surely means that the States have the power to regulate their own election campaigns, free from overriding federal regulations.[12]

---

[12] It is no answer to the Tenth Amendment problem to say that the Rule does not "regulate[] the states directly" or "compel[] the states to regulate private parties." App. A-26. That was true

(continued...)

CONCLUSION

Rule G-37 does violence to basic constitutional principles, to the fundamental political rights of citizens, and to the sovereign power of the States. Review is warranted to clarify the principles that govern the regulation of political activity, to undo the damage that Rule G-37 is causing on a continuing, nationwide basis, and to eliminate the danger that this Rule, the first of its kind, will be seen as a precedent.

---

[12](...continued)
in *South Carolina v. Baker,* 485 U.S. 505 (1988)—a case in which the Supreme Court reviewed a statute that deprived private citizens of the generally applicable tax exemption for interest earned on municipal bonds unless those bonds were issued in registered form. The statute did not directly regulate the States, but that did not foreclose a Tenth Amendment challenge. It was assumed sufficient to trigger the Tenth Amendment's provisions that the law "effectively require[d] states to issue bonds in registered form." *Id.* at 511. It is even more clearly the case that Rule G-37 effectively requires the States to do business only with certain municipal securities dealers. And it just as effectively prohibits the States from permitting the kind of election activity that Rule G-37 forbids. The court of appeals did not mention *South Carolina v. Baker.*

Respectfully submitted,

KEVIN T. BAINE*
ROBERT B. BARNETT
ERIK S. JAFFE
KEVIN M. DOWNEY
WILLIAMS & CONNOLLY
725 12th St., N.W.
Washington, D.C. 20005
(202) 434-5000

ANDREW P. CAMPBELL
LEITMAN, SIEGAL, PAYNE & CAMPBELL, P.C.
600 North 20th St., Suite 400
Birmingham, Alabama 35203
(205) 251-5900

Attorneys for Petitioner

**Counsel of Record*